Supreme Court, U.S.
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CASE NO. 85-948

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

KOSCOT INTERPLANETARY, INC.

Petitioner,

vs.

BEACHLEY INVESTMENTS, N.V., a corporation, ANDRES JOVANOVIC and ALIDA NINO de JOVANOVIC

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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FREDERICK W. PEIRSOL, Esquire
PEIRSOL, BOROUGHS, GRIMM,
BENNETT & GRIFFIN,
PROFESSIONAL ASSOCIATION
201 East Pine Street
Suite 520
Post Office Box 3309
Orlando, Florida 32802
Phone: 305/841-3353

Counsel for the Respondent

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is incomplete or inaccurate as follows:

Although the corporate installer's president testified that his intent was to have temporary offices at the Koscot Building, he also testified that he did not know whether his intent had been carried out.

Contrary to the statement on page 6 of Petitioner's Statement of the Case, there was evidence introduced at trial that showed the installer's intent to annex the partitions to the freehold. In specific, Petitioner introduced extensive expert testimony to show that the partitions were permanently installed in the Koscot Building and incorporated with the

building's electrical, plumbing and communications systems.

Petitioner urges on page 9 of its Statement of the Case that the Jovanovics did not submit a bid shown in any way to have been based in whole or in part on the value of the partitions. This statement of the evidence is incorrect. Mr. Jovanovic testified that he thought the term "as is" in the sales contract meant that the sale included the building and the offices in their then existing condition. Mrs. Jovanovic's testimony indicated that at the time she executed the contract she understood the walls were fixed to the building. Mr. and Mrs. Jovanovic further testified that no one informed them that the partitions were not included with the building.

SUMMARY OF THE ARGUMENT

The trial court's findings of fact were properly supported by competent evidence. Petitioner failed to properly object at trial to admission of the evidence it now claims was objectionable and failed to raise its purported constitutional issue below. Petitioner thereby waived its right to seek review in this Court of the allegedly objectionable evidence.

This case does not involve a conflict of decisions. The issue in this case is whether partitions are fixtures under Florida law. The two cases that were cited by Petitioner as conflicting decisions concern whether certain partitions should be classified as tangible personal property for

federal income tax purposes and thus qualify for the investment tax allowance.

ARGUMENT

THE TRIAL COURT'S FINDINGS OF FACT WERE SUPPORTED BY COMPETENT EVIDENCE AND DO NOT MERIT REVIEW BY THIS COURT.

Petitioner claims that its personal property was lost because the trial court relied on "constitutionally inadmissible evidence" in finding as fact that the nearly two miles of interior walls in the Koscot Building were sold to Respondent. Petitioner requests this Court to vindicate its right to possess the interior walls.

Notwithstanding Petitioner's attempt to attribute constitutional significance to the trial court's findings of fact, the case at bar merely involves an attempt by Petitioner to obtain yet another review of

factual issues that were ably determined by the trial court and based upon competent evidence. This case unquestionably fails to present special or important questions that merit consideration by this Court. Furthermore, Petitioner failed to properly object at trial to admission of the evidence that it now claims was objectionable and may not now raise its objections for the first time on appeal. The Petition for a Writ of Certiorari should be summarily denied.

A brief discussion of the issues at trial should readily illustrate that this case is inappropriate for review by this Court. At trial, the parties stipulated that if the property in question (the interior parti-

tions) were realty, it was conveyed to Respondent. The parties further stipulated that if the property were deemed to be personal property, then the second issue to be determined was whether the property was conveyed to Respondent as part of the sale of the real property. Under applicable Florida law, the question of whether certain property is personal or part of the realty is a question of fact. Corbett v. Appliance Buyers Credit Corp., 172 So.2d 257, 259 (Fla. 3d DCA 1965).

The criteria for determining whether an item has become a fixture and considered part of the real property to which it is affixed has customarily involved three basic tests:

actual annexation to the realty or something appurtenant thereto; appropriateness to the use or purpose of that part of the realty with which it is connected; and the intention of the party making the annexation that it shall be a permanent accession to the freehold. Commercial Finance Co. v. Brooksville Hotel Co., 123 So.2d 814, 816 (Fla. 1929), cited with approval in Matter of Gray Industries, Inc., 595 F.2d 1045, 1048 (5th Cir. 1979). Another significant factor is the extent to which the freehold would be damaged by removal of the property in question. E.g., Dependable Air Conditioning & Appliances, Inc. v. Office of Treasurer and Insurance Commissioner, 400 So.2d 117, 119 (Fla. 4th

DCA 1984). Respondent concedes that the intention of the installer is a factor which must be considered in determining whether certain property is a fixture and part of the realty. Nevercheless, the intention of the installer is but one of a number of factors that the trial court was required to consider.

The trial court heard testimony of expert witnesses from both Petitioner and Respondent. The experts testified in great detail concerning the method employed to install the interior partitions, the way in which the building's electrical, plumbing and communications systems were incorporated into the partitions, and the extent to

which the building would be damaged by removing the interior partitions.

Based upon the expert testimony, the trial court was able to conclude that the interior partitions were intended to be a permanent accession to the freehold. Petitioner neglected to mention to this Court that extensive expert testimony was presented at trial, presumably because it could not suggest that expert testimony is "constitutionally inadmissible evidence" that may not be considered in determining whether an item is a fixture and part of the realty.

Petitioner misleads this Court when it urges that the trial court relied solely upon testimony of certain individuals, including the fore-

closure judge, the receiver, the attorney for the seller, and from the buyer in foreclosure to determine whether the installer intended the property to be a permanent accession to the freehold. These witnesses offered testimony concerning whether Petitioner intended to retain the interior partitions when it sold the Koscot Building. As previously stated herein by Respondent, the parties stipulated at trial that if the property is deemed to be personal property, then the issue is whether the property was conveyed to Respondent as part of the realty. The fact that the trial court heard testimony concerning whether the partitions were intended to be retained by Petitioner on the

sale of the real property did not unconstitutionally impact Petitioner's right to present evidence concerning the installer's intention.

Finally, even if Petitioner's "constitutionally inadmissible evidence" argument is worthy of consideration by this Court, Petitioner would be precluded from presenting its arguments because it failed to properly object at trial when the allegedly objectionable evidence was offered and it failed to raise its "constitutional" issue in the court below. It is fundamental under the Rules of Evidence that error may not be predicated upon a ruling which admits evidence unless a timely objection or motion to strike appears of record. Fed.R.Evid. 103.

It is equally fundamental that only questions raised in the lower court may be raised on petition for certiorari. Ellis v. Dixon, 349 U.S. 458 (1955).

The Petition for Writ of Certiorari should be denied because the grounds raised for granting the writ have not been preserved for appeal and may not be considered by this Court. Furthermore, this case fails to present special and important questions that merit consideration by this Court. Petitioner simply failed to prove its claim for replevin of interior walls. Petitioner's attempt to create constitutional issues in a replevin case at this stage of the proceedings is preposterous.

A RULING THAT PARTITIONS ARE FIXTURES UNDER FLORIDA LAW DOES NOT CONFLICT WITH CASES THAT CLASSIFY PARTITIONS FOR FEDERAL TAX PURPOSES AS TANGIBLE PERSONAL PROPERTY.

Petitioner's argument concerning a decisional conflict is equally frivolous. In the case at bar, the United States Court of Appeals stated that the dispositive issue on appeal is whether the district court erred in classifying the property in question as fixtures to the real property. Applying Florida law, the trial court found as fact that the interior partitions of the Koscot Building were fixtures to the real property. The trial court's findings of fact were affirmed on appeal.

Both of the cases cited by Petitioner as being a conflict with this case concerned an entirely different issue, i.e., whether certain "movable partitions" should be classified as "tangible personal property" for federal income tax purposes.

In specific, the question before the appellate court in Minot Federal Savings & Loan Ass'n v. United States, 435 F.2d 1368 (8th Cir. 1970) was whether "movable partitions," as described by the court, were "tangible personal property" under 26 U.S.C. §48(a)(1) and thus qualified for the investment tax allowance. The court noted that in determining the meaning of the term "tangible personal property" that local law definitions will

not be controlling and that certain types of property that are normally considered fixtures under local law might still constitute tangible personal property for federal income tax purposes. Id. at 1369-70. The court did not hold that movable partitions are fixtures under Florida law. In fact, the court did not determine whether movable partitions constitute fixtures or part of the real property under any state's local law. Petitioner's assertion of a conflict of decision is totally without merit.

Likewise, in King Radio Corporation, Inc. v. United States, 486 F.2d 1091 (10th Cir. 1973), the court determined that certain "movable partitions" should be classified as "tan-

gible personal property" and qualify for the investment credit allowance. The court did not consider whether the movable partitions in that case should be classified as fixtures and part of the real property under Florida law or any other state law. Federal tax questions were the only issues before the court.

CONCLUSION

Petitioner is remarkably correct when it concedes on page 25 of its brief that the issues in this case are not deep. Respondent suggests, however, that the issues in this case are something more than "not deep," the issues raised by Petitioner are frivolous.

First, Petitioner requests this Court to review the trial court's findings of fact because it claims that "constitutionally inadmissible evidence" was before the trial court, but Petitioner neither properly objected at trial to the admission of the evidence nor raised its supposed constitutional issues below. Moreover, the evidence objected to by

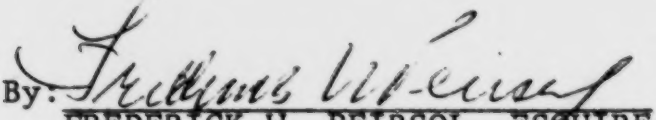
Petitioner was clearly admissible both on the issue of whether the walls were fixtures and whether they were intended to be conveyed as part of the sale of the building. Second, Petitioner contends that a decisional conflict exists between this case, which holds that certain partitions are fixtures under Florida law, and two federal investment credit cases, which held that certain partitions should be classified as tangible personal property for federal income tax purposes. Contrary to Petitioner's contention, these decisions in no way conflict.

The failure of Petitioner to raise a colorable decisional conflict or any other valid reason for review by this

Court justifies an award to Respondent of damages under Sup.Ct.R. 49.2. In any event, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PEIRSOL, BOROUGHS, GRIMM, BENNETT & GRIFFIN, PROFESSIONAL ASSOCIATION

By: 
FREDERICK W. PEIRSOL, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing has been furnished by U. S. Mail this 2nd day of January, 1986, to Stanley Jay Bartel, P.A., 2150 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130, Counsel for the Petitioner.

Frederick W. Peirsol